IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1088 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHRAVANBHAI MONGHIYABHAI PADVI

Versus

THE STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1088 of 1994

MR BHARGAV N BHATT for Appellant

MS HANSA B PUNANI APP for Respondent - STATE OF GUJARAT

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: 19/07/2003

C.A.V. JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

1. The appellant, who was an accused before the trial Court has, by preferring this Criminal Appeal under Section 374(2) of the Criminal Procedure Code, 1973 [hereinafter be referred to as the "Cr.P.C."] challenged the correctness, legality and validity of the judgment, Ex.44 dated 11.10.94 of conviction and sentence rendered by the learned Additional Sessions Judge, Valsad at Navsari [who will be referred to hereinafter as the "learned Judge of the trial Court"] in Sessions Case No.76 of 1993, by which the appellant has been convicted for an offence punishable under Section 302 of the Indian Penal Code, 1860 [for short "I.P.C."] and is sentenced to undergo imprisonment for life and to pay a fine of Rs.500/-- and in default of payment of fine, to undergo further simple imprisonment for two months.

2. The facts leading to this present appeal in a nutshell can be summarized as follows :-

2.1 P.W.6 complainant - Karmabhai Tukaram Thakare, resident of village Nizar (District Surat), was at relevant point of time a "mukkadam" (leader) of the labourers, who were doing the manual labour work of cutting the crop of sugarcane and under his leadership about 22 persons were working. Since six months before the date of incident, the complainant and labourers of his party were working that work of cutting the crop of sugarcane for Gandevi Sugar Factory and since one and half month before the date of incident, he and his party members were working in the field of members of "Sahakari Khand Udhyog Mandali Limited" of Gandevi. Since two days before the date of incident, they were working in the field of one Natubhai Chhibabhai Patel of Duvada.

2.2 On the date of incident i.e. on 03.05.93, in the morning at about 8.00 A.M., the complainant and members of his party had gone to the field of Natubhai Chhibabhai Patel of Duvada for doing the manual labour work of cutting the crop of sugarcane. The victim Mohanbhai Fatubhai Padvi (deceased) and his wife P.W.11 - Rainaben, appellant Shravanbhai Monghiyabhai Padvi and his wife Poholi were the members of a party of the complainant and on that day, the deceased Mohanbhai Fatubhai Padvi had not gone for work of cutting the crop of sugarcane as he was suffering from illness of fever, but his wife P.W.11 Rainaben had gone to the field for the said work. The appellant and his wife Poholi had also gone to the field at about 8.00 A.M., but rest of the members of the party of the complainant had objected that the appellant and his wife had not come for the work on previous day and,

therefore, they were not permitted to do the work in the field. In these circumstances, the appellant and his wife both had gone back to the place of encampment for their temporary residence. From the record, it appears that most of the members had their temporary residence in the camp where they had encamped in the open land earmarked for grazing for cows, just on the side of Wadi Falia on the outskirts of village Endhal (Taluka Gandevi of District Valsad). Accordingly, the deceased, his wife Rainaben and their two daughters P.W.10 Vaishali, Mangala and one another minor daughter of sister of Rainaben were residing in this type of camp.

2.3 As per the evidence of P.W.10 Vaishali Mohanbhai Padvi, she was knowing the appellant and on the date of the incident, she and her sister Mangala and her father were present in their temporary residence in the camp. As per her deposition, her mother had gone for doing the manual labour work of cutting the crop of sugarcane and on that day, the appellant was present in his residence in the said camp. The wife of the appellant had also gone for the manual labour work. According to the say of Vaishali, her father was sleeping inside the hut in the camp and at that time, she and her sister Mangala were playing behind that hut. According to the say of Vaishali, on the date of incident, the appellant had inflicted blows of "Koita" (special type of sickle which is used for cutting the crop of sugarcane) on neck, face and hand of her father and at the time of incident, she was very much present near the hut. According to her say, the appellant had beaten her father and, thereafter, the appellant fled away by taking with him "Koita". Immediately after the aforesaid incident, she went running to her mother Rainaben. According to say of Rainaben, Vaishali and Mangala both had come to her at about 2.00 P.M. and Vaishali told her that Shravan (appellant) had killed her father by "Koita". On hearing this news, Rainaben immediately went to the complainant Karma Tukaram and informed him about the message conveyed to her by her daughter - Vaishali.

2.4 As per the say of Karma Tukaram, complainant, when work of cutting the crop of sugarcane was going on, Mangala and Vaishali both had come to him. First, out of that two girls, Vaishali informed her mother that Shravan (appellant) had killed her father. Thereafter, the complainant Karma Tukaram, Rainaben and two daughters and other labourers started to proceed towards the temporary residence of the labourers in the camp. When they were going towards that camp, Shravan (appellant) met them in Pad Falia on the way and at that time, the weapon "Koita"

was with him, in his hand. Thereafter, they caught hold of the appellant and took him to P.W.7 Dinubhai Naranbhai Patel, who, at that time, was a Sarpanch of village Endhal.

2.5 As per the say of P.W.7 Dinubhai Naranbhai Patel, P.W.7, on the date of incident at about 3.30 P.M., when he was present in his house, mukkadam Karma Tukaram, in company of other 7 to 8 labourers, came to his house. They informed Dinubhai Naranbhai Patel that Shravan (appellant) had beaten Mohanbhai Fatubhai Padvi on his head, portion below head and hand. Thereafter, he made that person to sit on Ota of his house. As per his say, Shravan (appellant) had a blood stained "Koita" with him. Thereafter, he made a phone to Police Chowki of Gandevi from the house of his neighbour - one Doctor. As per his say, after informing the Police on phone, he kept two labourers present near the appellant on Ota for his watch. He went to the temporary residence of labourers in the camp and he had seen that deceased had sustained injuries on his head and hand and the blood was coagulated and that Mohanbhai Fatubhai Padvi had died. Thereafter, he returned to his house and within short time, the police came to his house.

2.6 As per the evidence on record, P.W.13 - Shri Rajabhai Govabhai Desai, who was performing his duty as P.S.I. in Gandevi Police Station, came to know through the P.S.O. P.W.12 Bhanuben Somabhai that one offence of murder has been committed in the village Endhal. Immediately, thereafter, he rushed to the village Endhal and as per the record, the complainant Karma Tukaram lodged his complaint to P.W.13 P.S.I. Shri Desai at 16.30 hours, at the very place of incident. Thereafter, P.S.I. Shri Desai sent that complaint of Karma Tukaram to P.S.O., Gandevi Police Station, Gandevi for its registration.

2.7 As per the evidence of P.W.12 Bhanuben Somabhai, she received that complaint and on the basis of that complaint, crime was registered at 17.00 hours on 03.05.93 in the Gandevi Police Station. That complaint came to be registered as C.R.No.I-34/93 for the offence punishable under Section 302 of I.P.C. Thereafter, P.W.12 Bhanuben Somabhai, by putting her endorsement below that very Yadi which was sent by P.S.I., entrusted the police investigation of the crime to P.W.13 P.S.I. Shri Desai. As per the say of Mr.Desai, on receiving back the complaint with an endorsement below his Yadi, he started to conduct a police investigation.

2.8 First, he went to the place of temporary residence of labourers in the camp situated in the land earmarked for grazing by the cows on the side of Wadi Falia, on the outskirts of village Endhal. By keeping two independent persons as panch witnesses, he held an inquest panchnama of the dead-body and drew an inquest panchnama during the period between 17.15 hours and 18.00 hours on 03.05.93. He recorded the statements of the witnesses conversant with the facts of the case. Thereafter, he drew a panchnama of the scene of offence by keeping present those very two panch witnesses, during the period between 18.15 hours and 19.00 hours on 03.05.93. Thereafter, he sent dead-body for autopsy to the Medical Officer of Primary Health Centre of Dhanori (Taluka Gandevi) with Police Constable Shri Kashinath Arjun. He seized the samples of control clay and blood stained clay under a panchnama from the place of scene of offence. Accused was very much available in the house of Sarpanch, and at that time, the clothes of the accused were found stained with blood and accused had with him a blood stained "Koita". Thereafter, he sent accused with one Police Constable to Gandevi Police Station. After reaching Gandevi Police Station, he drew a panchnama of physical condition of accused in the presence of two panch witnesses in Gandevi Police Station, during the period between 23.00 hours and 23.30 hours on 03.05.93. Thereafter, he performed necessary formalities with regard to recording of the statement of accused and preparing a muddamal pavti.

Thereafter, on the next day, he produced accused in the Court of the learned Judicial Magistrate [F.C.], Gandevi [who will be referred to hereinafter as the "learned J.M.F.C."] for taking him in the judicial custody. Thereafter, on 13.05.93, he handed over the police investigation to P.S.I. Shri G.S.Raval.

Thereafter, on 10.06.93, P.W.14, P.S.I. Shri Kantilal Meghjibhai Khirsariya, (Ex.36) received police papers for further investigation from P.S.I. Shri G.S. Raval. Thereafter, P.W.14 Shri Kantilal Meghjibhai Khirsariya sent incriminating articles, weapon and clothes of the accused, etc. for examination and analysis to the Forensic Science Laboratory, Surat [for short the "F.S.L.].

Thereafter, he received a report of F.S.L. and on 22.07.1993, he handed over the police investigation to P.S.I Shri N.V.Desai.

P.S.I. Shri N.V.Desai completed the police

investigation and, on 26.07.1993 and filed a charge-sheet against the accused for an offence punishable under Section 302 of the Indian Penal Code in the Court of the learned J.M.F.C., Gandevi. That charge-sheet came to be registered as Criminal Case No.1820 of 1993. The learned J.M.F.C, Gandevi, by passing a committal order under Section 209 of Cr.P.C. on 18.08.1993, committed the said case to the Sessions Court, Valsad at Navsari. On receipt of papers of that case from the Court of the learned J.M.F.C., Gandevi, that case came to be registered as Sessions Case No.76 of 1993 in the Court of Sessions, Valsad at Navsari.

3. The appellant had engaged his private advocate in the Sessions Court, Valsad at Navsari. On the basis of material on record, the learned Judge of the trial Court framed the charge Ex.1 on 26.04.1994. On recording plea of the appellant, he pleaded not guilty to the charge and claimed to be tried.

4. In order to bring home the charge against the accused for which the charge Ex.1 was framed, the prosecution examined the following witnesses :-

P.W.1 Natubhai Kuthabhai Patel Ex.7
(Circle Inspector, who prepared a
Map of scene of offence)

P.W.2 Dr.Pravinbhai Durllabhbhai Patel, Ex.10
(who performed postmortem on the
dead-body of deceased Mohan Fatu
Padvi).

P.W.3 Govindbhai Bhagabhai Patel, Ex.12
One of the panch witnesses of inquest
panchnama and panchnama of scene of
offence).

P.W.4 Dahyabhai Ranchhodbhai, Ex.15
(One of the panch witnesses of pachnama
of physical condition of appellant and
recovery panchnama of "Koita").

P.W.5 Shaileshbhai Govindbhai Patel, EX.19
(Second panch witness of panchnama of
physical condition of appellant and
recovery panchanama of "Koita").

P.W.6 Karmabhai Tukaram, Ex.21
(original complainant)

P.W.7 Dinubhai Naranbhai Patel, (Sarpanch of village Endhal). Ex.22

P.W.8 Bhimsing Samsing, (One of the labourers working with the wife of the deceased Mohanbhai Fatubhai Padvi). Ex.23

P.W.9 Bhagvansinh Subhkaransinh, (Interpreter appointed by the Court for recording evidence of daughter and wife of the deceased Mohan Fatu Padvi). Ex.24

P.W.10 Vaishali Mohanbhai, (Eye witness to incident). Ex.25

P.W.11 Rainaben Mohanbhai, (Wife of the deceased Mohanbhai Fatubhai Padvi). Ex.26

P.W.12 Bhanuben Somabhai, Police Jamadar, (P.S.O. of Gandevi Police Station). Ex.27

P.W.13 P.S.I. Rajabhai Govabhai Desai, (First I.O.) Ex.32

P.W.14 P.S.I. Kantibhai Meghjibhai Kirsariya, (Second I.O.). Ex.36

5. The prosecution also produced and proved certain documents in support of their case against the accused/ present appellant. Out of those documents, the prosecution has placed heavy reliance on the following documents.

1. Panchnama of clothes recovered from the deadbody of deceased Mohanbhai Fatubhai Padvi. Ex.6

2. A Map of scene of offence. Ex.8

3. Postmortem Notes. Ex.11

4. Inquest Panchnama. Ex.13

5. A panchnama of scene of offence. Ex.14

6. A panchnama of physical condition of the appellant as well as recovery - panchnama of "Koita". Ex.16

7. Complaint Ex.33

8. Report of F.S.L. Ex.38

6. After recording evidence of the prosecution witnesses was over, the incriminating circumstances appearing in the evidence were brought to the notice of and explained to the appellant and whatever replies were given by him were noted down below his plea Ex.2. The defence of the appellant is of general denial. Practically he has denied, to all questions by replying "it is not true". He has stated in his reply in last question that he has got a young daughter and an old mother in his family and that he is innocent. He has neither examined any witness or himself as defence witness nor produced any documentary evidence in his defence. Thereafter, the learned Judge of the trial Court, after hearing the arguments of the learned advocates of both the parties and after examining and appreciating the evidence on record, held the appellant guilty for an offence punishable under Section 302 of I.P.C. He has come to a conclusion that the deceased Mohanbhai Fatubhai Padvi died a homicidal death. He has also come to a conclusion that the appellant committed an offence of murder punishable under Section 302 of I.P.C., by inflicting blows of "Koita" on the neck, head and other parts of the body of the deceased. He has accepted a case of prosecution with regard to motive stating that 7 to 8 months before, the appellant had demanded liquor from the deceased and as deceased did not give liquor to him, he committed murder of the said Mohanbhai Fatubhai. On the basis of these conclusions, the learned judge of the trial Court has, by rendering the judgment Ex.44 dated 11.10.1994, convicted and sentenced the appellant as stated in para-1 hereinabove.

7. Being aggrieved against and dissatisfied with the said judgment of conviction and sentence, the appellant has filed this present appeal.

8. We have heard Mr.Bhargav N. Bhatt, learned advocate for the appellant and Ms.Hansa B. Punani, learned APP for the respondent - State of Gujarat, in detail at length. Mr.Bhatt has taken us through the entire evidence on the record and Ms.Punani has taken us through the impugned judgment.

9. Mr.Bhatt has assailed the judgment impugned in this appeal mainly on the following grounds :-

[A] The entire case of the prosecution rest on deposition of a child witness - Vaishali Mohanbhai Padvi, Ex.25, because as per the case of the prosecution, she saw the incident and after seeing the incident, she rushed to her mother in the field where she was doing the manual labour work of cutting the crop of sugarcane and informed her about the incident and her mother in turn informed the complainant about the incident. Thereafter, complainant in turn informed about the incident, to P.W.7 Dinubhai Naranbhai Patel, Sarpanch of village Endhal. The complainant Karma Tukaram had lodged his complaint on the basis of what was conveyed by Rainaben, wife of deceased Mohan Fatu Pandvi to him and Rainaben had informed the complainant on the basis of message given by her daughter Vaishali. Thus, Vaishali is an important key witness in the present case. Mr.Bhatt has argued that this witness is not an eye witness to the incident and that from her evidence, it appears that, she is a tutored witness and, therefore, no reliance can be placed on such tutored sole child witness.

[B] The First Information Report is ante-timed and looking to the facts and circumstances of the case, it can safely be said that somebody had killed the father of Vaishali and real offender was not traceable but, subsequently, the appellant has been roped in falsely with a concocted story of the alleged incident.

[C] The prosecution has suppressed the genesis of the case, by not producing the documentary evidence relating to the message given on phone to P.S.O. of Gandevi Police Station, by Shri Dinubhai Naranbhai Patel, Sarpanch of village Endhal, at the earliest point of time.

[D] The motive which is sought to be believed, is so remote and weak, that for such motive, no person can take step of killing a person for a quarrel which took place in between deceased and the appellant before seven months. That quarrel was of a trifle matter that appellant had demanded a bottle of liquor from the deceased and the deceased did not give bottle of liquor to the appellant. The case advanced by the prosecution is highly improbable, looking to post conduct of the appellant, after the commission of alleged offence. It is not believable that accused after committing an offence ran in that direction in which labourers of team of Karma were working in the field. On the contrary, he had a chance to run away in opposite direction.

[E] The investigation is not only incomplete and illegal, but it is a dishonest with a view to see that any how a case can be made out for murder of deceased Mohanbhai Fatubhai Padvi Padvi. Looking to the medical evidence, the incident of murder of Mohanbhai Fatubhai Padvi must have taken place before fifteen to sixteen hours as rigor mortis was found present, when Dr.Pravinbhai Durllabhbhai Patel performed postmortem at about 12.30 P.M. on 04.05.1993. Mr.Bhatt has argued that looking to the evidence of Dr.Pravinbhai Durllabhbhai Patel, the alleged offence of murder must have been committed at about 20.30 or 21.30 hours on 03.05.1993 and not at 14.00 hours. This is quite possible in view of the fact that the appellant was arrested at 23.30 hours on 03.05.1993.

[F] Mr.Bhatt has argued that looking to the evidence on record and submission made by him, this is a case in which the prosecution has not proved the case beyond the reasonable doubt. Lastly, he has argued that appellant be acquitted by allowing this appeal.

10. Ms.Hansa B. Punani, learned APP for the respondent - State of Gujarat has supported the judgment of conviction and sentence, through out. She has argued that P.W.10 Vaishali Mohanbai Padvi is a natural eye witness and there is no reason to disbelieve her. She has further argued that there is nothing on record to show that Vaishali Mohanbhai Padvi is a tutored witness. She has further argued that the learned Judge of the trial Court has given cogent and convincing reasons for believing this child witness. She has also argued that the testimony of child witness gets corroboration from the oral evidence of her mother, complainant and other witnesses also. During the course of arguments, she has further argued that evidence of Vaishali is cogent consistent, trustworthy and acceptable and in view of this, the learned Judge of the trial Court has, by placing reliance on her evidence, rightly convicted the appellant. Lastly, she has argued that this appeal is devoid of merits and hence, same is required to be dismissed.

11. We have dispassionately considered the submissions of the learned advocates for both the parties. We have carefully and minutely examined the evidence on record. We have made thorough examination scrutiny and re-appreciation of the evidence on record to come to our own conclusions to decide this appeal. We have perused the impugned judgment, which is challenged in this appeal. We have also gone through the record and

proceedings of the case, which have been called for from the trial Court.

12. There is no dispute from the appellant side that the deceased Mohanbhai Fatubhai Padvi died homicidal death. Mr.Bhatt has not argued on this point with regard to homicidal death of the deceased Mohanbhai Fatubhai Padvi. Still, however, we have carefully examined an inquest panchnama Ex.13 and postmortem notes Ex.11. The postmortem notes Ex.11 is proved by P.W.2 Dr.Pravinbhai Durllabhbhai Patel, Ex.15. According to his evidence, on 04.05.1993, he (P.W.2 Dr.Pravinbhai Durllabhbhai Patel, Ex.15) was serving as Medical Officer in Primary Health Centre at Dhanori and on that day at about 12.00 noon, one Police Constable Kashinath Arjun, B.No.1657 had brought a deadbody of Mohanbhai Fatubhai Padvi for the purpose of autopsy. He has further deposed that, that deadbody was identified by Rainaben w/o. deceased Mohanbhai Fatubhai Padvi. He started to perform postmortem at 12.30 P.M. (Noon) on 04.5.1993 and completed it at 2.30 P.M. on the very same day. According to his deposition, he had seen following external injuries :-

1. An incised wound from left ear lobular to left side of chine oblique in direction about 8" flength 2 ft. wide 2 ft. deep.

2. Incised wound on left side of neck transverse in direction 4" x 3" x 3" which cut chaotic artery, jugular vein and right radial artery and trachea.

3. Incised wound just above the right wrist joint deep to cut the right left radial artery 2.5" x 2" x 1.5".

4. Incised wound of left side arm deep to muscle 1' x 1' x 1/2", size below elbow 3' x 2' x 1/2".

5. Incised wound on left side of the head on left side parital temporary on frontal region 4 x 1.5 x 1.5 deep to parital occipital wound bone in direction.

6. One incised wound on head ageing to back wound in direction deeply parital bone which 4' X 1/2' x 1/2'.

7 Incised wound of right side solider joined / in directions 1/2 each x 1/2 each x 1/2 each.

He noticed following internal injuries.

[A] (1) Incised wound left side of skull.

(2) Brain : Normal and congested.

[B] (a) Trachea incised on Neck
Blood clotting into the neck.
(b) Lungs : Congested.
(c) Heart : Congested.
(d) Jugular vein cut on left side of neck and
left Colon artery also cut incised.

Peritoreum : (Coagulated.
(Pale.
Jaw, Teeth Oesophagus incised at left side neck
Tongue : Congested.
Stomach : Congested and contained,
Semi digested food.
Small - Congested and contained,
Intenstine : Semi congested food.
Big Intenstine: Congested and contained fecule matter &
Liver & Gall- goods.
Bladder : Congested.
Congested.
Sleen : Congested.
Kidney : Congested.
Bladder : Congested and
Lower Belly : Congested.
This person has died 4-6 hours after
having a meal.

P.W.2 Dr.Pravinbhai Durllabhbhai Patel, Ex.10 had noted external injuries, which he has listed in para-17 of postmortem notes, Ex.11. For internal injuries, he has deposed in para-1 of his deposition that he noticed internal injuries, which he has listed in paras 19, 20 and 21 of postmortem notes and for that he has deposed in para-2 of his deposition. He has deposed that the aforesaid injuries were ante mortem and cause of death was shock and haemorrhage due to cutting of left chaotic artery, left jugular vein and right radial artery and cutting of trachea. He has deposed that the aforesaid injuries were sufficient to cause death in original course of nature. The learned Judge of the trial Court has discussed aspect with regard to homicidal death of deceased - Mohanbhai Fatubhai Padvi in paras 11, 12, 13 and 14 of his judgment by giving cogent and convincing reasons, and he come to a conclusion that Mohanbhai Fatubhai Padvi died a homicidal death. We see no reason to differ from the finding arrived at by the learned

Judge of the trial Court and, therefore, we uphold that finding with regard to homicidal death of deceased Mohanbhai Fatubhai Padvi.

13. As argued by Ms.Punani, learned APP for the respondent - State of Gujarat this is a case in which the entire case rests only on the evidence of solitary eye witness and that too a child witness namely P.W.10 Vaishali daughter of deceased Mohanbhai Fatubhai Padvi. She has argued that if this child witness is not believed, then question will not arise for consideration of other evidence on record because foundation of the case is an evidence of Vaishali and on that foundation, the prosecution has, by putting other pieces of evidence, constructed a case for which a charge has been framed against the accused and, therefore, here in this case, most material and important evidence is that of P.W.10 Vaishali daughter of deceased Mohanbhai Fatubhai Padvi. Looking to the nature of facts and circumstances of the case and the evidence led by the prosecution, it would be proper to discuss the other evidence first and in light of that other evidence testimony of Vaishali daughter of deceased Mohanbhai Fatubhai Padvi is required to be examined and re-appreciated. In view of this, we have thought it fit to discuss other evidence first and then an evidence of sole eye witness, who is a child witness P.W.10 Vaishali daughter of deceased Mohanbhai Fatubhai Padvi.

14. Mr.Bhatt has argued that the prosecution has come with a case of specific motive for which, the accused murdered Mohanbhai Fatubhai Padvi. Here in this case, complainant - Karma Tukaram, who was the leader of labourers, has stated certain facts with regard to motive. It is stated in the complaint Ex.33 that seven months before the accused, appellant herein had demanded a bottle of liquor from the deceased Mohanbhai and deceased Mohanbhai did not give it to the accused and in that connection, a quarrel took place in between the deceased and the accused. It is further stated that because of this quarrel, the accused committed murder of the deceased. The complainant Karma Tukaram has rightly stated in his complaint that the facts regarding the alleged motive was stated to him by Rainaben wife of the deceased Mohanbhai Fatubhai Padvi. Naturally others might not be knowing about the reason behind the quarrel which took place before seven months and, therefore, the source of facts in connection with the alleged motive was a wife of deceased.

P.W.11 Rainaben w/o. Mohanbhai Fatubhai Padvi,

Ex.26 has deposed in her evidence that before the date of evidence, the accused had demanded the bottle of liquor from her husband and it was not given by her husband and due that, a quarrel took place in between the deceased and the accused. Mr.Bhatt has vehemently argued that looking to the nature of alleged motive, no sane person will murder a person for this trifle cause and that too after seven months. Thus motive is too remote and weak and it would not prompt anyone to kill the person. From the facts, stated by the Rainaben Mohanbhai Padvi for this alleged motive, we are of the view that it does not stand to reason that one would kill for this type of trifle matter and that too after seven months. We are of the view that something must had happened before the actual incident which had taken place. We have discussed the other evidence hereinafter, and from that evidence, it appears to us that genesis of the case is suppressed because there is not a single iota of evidence to satisfy us as to what prompted the accused suddenly to kill the deceased, before happening of this type of incident. Some altercation or scuffle must have taken place. Here in this case, the prosecution has come with a case that when the deceased was sleeping inside his temporary residence in the camp, the accused came and inflicted the blows of "Koita" on the body of the deceased and solitary eye witness is projected before the Court that she only saw the actual happening of the incident and not a single event had taken place prior to the incident. This seems to be absurd and illogical, therefore, we are not impressed upon the case of motive which is stated by Rainaben w/o. deceased Mohanbhai Fatubhai Padvi, for the commission of an offence of murder.

15. We are conscious of the fact that when there is an eye witness to the incident, the importance of motive is diminished or there remains no significance of any motive. As said earlier, herein this case, child Vaishali Mohanbhai Padvi is only eye witness and if she is not believed then there remains no case. This aspect with regard to motive is kept in mind, when evidence of child witness will be appreciated, hereinafter.

16. At the outset of hearing, Mr.Bhatt has argued that in this case, genesis of the case is suppressed to a larger extent for which F.I.R. is ante-timed. He has further argued that other evidence is such that one can safely come to a conclusion that the accused is implicated in this case falsely on the basis of a concocted story which is advanced to strengthen the case of the prosecution.

17. Whether F.I.R. is ante-timed or not, is a crucial question, which falls for our consideration. It is the case of the prosecution, from the very beginning, that the incident took place at about 2.00 P.M. on 03.05.1993 in the temporary residence of the deceased in the camp, while he was sleeping in it. It is the case of the prosecution that on that fateful day, the deceased had not gone for labour work because he was suffering from illness of fever. It is further the case of the prosecution that when the deceased was sleeping inside his temporary residence in the camp, his two daughters Vaishali and Mangala and one another daughter of sister of Rainaben were playing behind the residence and that these three girls had seen the incident. It is further the case that immediately thereafter, Mangala and Vaishali ran and reached to the place, where their mother Rainaben w/o. of deceased Mohanbhai, was working in the field. As per the deposition of P.W.11 Rainaben (Ex.26), that two girls Mangala and Vaishali came to their mother and Vaishali told her mother that Shravan had killed her father by "Koita". This is the only information given by Vaishali to her mother and on the basis of that information, Rainaben went to Karma Tukaram, who was leader of the labourers and that very message given by Vaishali to her, was given by her to P.W.6 Karma Tukaram. Karmabhai (Ex.21) has deposed that at about 2.00 P.M. or 2.15 P.M., Mangala and Vaishali had first come to their mother and Vaishali told her mother that her father was killed by Shravan (appellant) and, thereafter, Rainaben informed that message to him. According to the evidence of Karmabhai, immediately, thereafter, Rainaben, her two daughters, P.W.8 Bhimsing Samsing (Ex.23) and Karmabhai Tukaram started to proceed towards the temporary residence of the labourers in the camp by passing over the road nearby canal. P.W.6 Karmabhai has deposed that when they were proceeding towards the temporary residence of the labourers in the camp, the accused met them on the way and they caught hold of him and carried him to the Sarpanch of the village. According to him, Sarpanch had given information to the police by making a telephone and, therefore, the police came to the Sarpanch of the village. The prosecution has examined P.W.7, Dinubhai Naranbhai Patel (Ex.22), who was at relevant point of time, Sarpanch of the village Endhal. He has deposed that on the date of incident at about 3.30 P.M., he was present in his house and at that time mukkadam had come to his house along with other 7-8 labourers and they had brought with them accused Sharavan by catching hold of him. As per the evidence of P.W.7, Dinubhai, Karma Tukaram had informed him that Shravan had inflicted blows of "Koita" on head, lower portion of the body below head

and hands of Mohan Fatu. On receiving such information, he asked that persons along with the accused to sit on Ota of his house. He has further deposed that he had made a phone to the Gandevi Police Chowki from the house of one Doctor, who is his neighbour. We deem it fit and proper to examine the evidence of the prosecution upto this stage, for time being. We find that -

[a] At the earlier point of time, Vaishali gave a message first to her mother Rainaben and according to Rainaben, Vaishali told her that Shravan (appellant) had killed her father by "Koita".

[b] In turn, Rainaben passed on the said message to the complainant Karma Tukaram. P.W.6 Karmabhai has deposed that the mother of Vaishali informed him that the father of Vaishali had been killed by Shravan (appellant). Karma does not say anything about the "Koita".

[c] Thereafter, in turn, Karma informed Dinubhai Naranbhai Patel, Sarpanch of the village that Shravan (appellant) had inflicted blows of "Koita" on the head, portion below it and on the hand of Mohanbhai Fatubhai Padvi. It is to be noted that Rainaben has not informed to Karma Tukaram, as to on what parts of the body, the Shravan (appellant) had inflicted blows on the deceased. She did not state anything about the weapon to Karma Tukaram.

[d] Thus, it appears that the message gave by Vaishali, was changed from stage to stage. We have kept this fact in our mind, while deciding the point with regard to submission that F.I.R. is an ante-timed.

18. As per the evidence of P.W.7 Dinubhai Naranbhai Patel (Ex.22), he made a telephone to Gandevi Police Station from the house of his neighbour Doctor and the police came to his house. According to the deposition of P.W.7 Dinubhai, at about 3.30 P.M. Karma Tukaram and in company of 7-8 labourers had come to his house and they had brought the accused Shravan by catching hold of him. As per his evidence, after making a phone, he kept two labourers for watch at the Ota of his house and he went to the place of temporary residence of labourers in the camp and he saw that the deceased had sustained injuries on his head and hand and the blood was coagulated and he found that he had died. Thereafter, he returned to his house and, soon there, the police came to his house and police started to perform the necessary formalities.

19. P.W.13 Rajabhai Govabhai Desai, Ex.32, who was, at relevant point of time, performing his duties as P.S.I. in Gandevi Police Station, has deposed that on 03.05.1994, he was informed of by P.S.O. that one offence of murder has been committed at village Endhal and, therefore, he went to village Endhal and took down the complaint Ex.33 of Karma Tukaram. It is the case of the prosecution that he took down that complaint at 16.30, hours at the place of incident. P.W.11, Rainaben has deposed that the field in which she was doing the work of cutting the crop of sugarcane, was at a distance of 3 k.m. from their temporary residence of the camp. P.W.6 Karmabhai had gone to the house of Dinubhai Naranbhai Patel, Sarpanch of the village Endhal at 3.30 P.M. and he informed him about the alleged incident. He made them to sit on Ota of his house. He gave message to Gandevi Police Station by phone and then they started to go to the place of scene of offence for reaching that place, he covered a distance of 3 k.m. and after seeing the deceased on the spot, he again covered up a distance of 3 k.m. and returned to his house. P.W.7 Dinubhai has nowhere stated that how he reached the place of incident. A person can cover a distance of 1 k.m. within a minimum period of 8 to 10 minutes and, therefore, it can be said that P.W.7 Dinubhai, while going to and coming back to his house, must have spent at least one hour and, therefore, he has rightly deposed that police came to his house after he returned from the place of the alleged incident to his house. He has deposed that police came to his house at 4.30 to 4.45 P.M. It is the case of the prosecution that the complaint Ex.33 was recorded at 4.30 P.M. P.W.13 P.S.I. Desai has deposed in his deposition that he recorded the complaint Ex.33 of Karma Tukaram at the scene of offence and, therefore, P.S.I. Desai and other police personnel had first come to the house of Dinubhai, Sarpanch of the village Endhal and then they went to the place of incident at a distance of about 3 k.m. and after reaching the place of incident, P.S.I. Desai recorded the complaint of Karma Tukaram. Considering this evidence, P.S.I. Desai, he recorded the complaint of Karma Tukaram at about 4.30 P.M. at the scene of offence. This is not probable.

As against this, P.W.6 Karmabhai has deposed that he informed the Sarpanch and the accused was tied there and, thereafter, a Sarpanch made a phone to police. The police came to the house of Sarpanch and the police took away Shravan (appellant) with them. He has deposed that first they went to the house of Sarpanch, thereafter, they went to the place of incident and saw Mohanbhai Fatubhai and they found Mohabhai Fatubhai dead.

Thereafter, on his reaching to to Gandevi Police Station, he lodged his complaint. P.W.6 Karmabhai has no reason to depose falsely because he is a labourer and for him, the deceased and accused were equal because both were the labourers in his team of which he was a leader. P.W.6 Karmabhai has deposed that he put his thumb impression on the complaint and on the next breath he has deposed that he signed the complaint. Document mark 5/2 was shown to him. He had deposed that it bore his signature. In the cross-examination, he has deposed that he does not know how to make a signature, but if someone gives a writing to him, he would copy it as per the given writing.

20. We have examined the original complaint Ex.33 and found that it bears the signature of Karma Tukaram. Any how, it is less material, whether thumb impression or signature was put, but the version of Karma Tukaram and version given by P.S.I. Shri Desai are quite contradictory. He has deposed that before lodging the complaint, he had not seen Mohanbhai Fatubhai and he had no personal knowledge as to whether Mohanbhai Fatubhai was alive or dead. If the complaint was lodged at the place of scene of offence, he would not have said that before lodging the complaint, he had not seen Mohanbhai Fatubhai and he had no personal knowledge as to whether Mohanbhai was alive or dead. From this evidence, it appears to us that he must have gone to Gandevi Police Station, straightway from the residence of Sarpanch of village Endhal and lodged his complaint in the Police Station. P.S.I. Shri Desai says that he took down the complaint of Karma Tukaram at the place of incident and Karma Tukaram says that he went to Gandevi Police station and lodged his complaint. This is very material aspect because, we have to examine F.I.R. to ascertain as to whether it is ante-timed or not.

21. P.W.7 Dinubhai has deposed that at about 3.30 P.M., mukaddam Karma came to his house along with 7-8 labourers and informed him that Shravan had inflicted blows of "Koita" on the head and portion below it and hand of deceased Mohanbhai Fatubhai. So before making a phone, he was well aware as to what had happened. He was knowing the name of assailant. He was knowing the name of the victim and the name of weapon and on receiving this specific information, he had made a phone to Gandevi Police Station. He was well aware about all the facts which he came to know from Karma Tukaram and then he phoned to Gandevi Police Station. P.S.I. Desai is very much confident in his evidence that he was informed of by P.S.O. that one offence of murder was committed at village Endhal. He has deposed that he received an oral

information from the P.S.O. He has deposed that on that day, the police head constable Smt.Bhanuben Somabhai was on duty as P.S.O. in the Police Station. He has categorically deposed that it was not true that Smt.Bhanuben Somabhai had not informed him meaning thereby Smt. Bhanuben Somabhai had informed him. The prosecution has examined that P.S.O. Bhanuben Somabhai as P.W.12, at Ex.27. She has admitted that she was in charge of P.S.O. of Gandevi Police Station during the period between 14.00 hours to 20.00 hours on 03.05.1993. If P.S.I. Desai is confident that Smt.Bhanuben Somabhai had informed him about the offence of murder committed at village Endhal, then it must be presumed that Sarpanch Dinubhai Naranbhai Patel had given an information to Gandevi Police Station on phone and that phone was received by P.S.O. Bhanuben Somabhai. Smt. Bhanuben has courage to say that during her period of duty, she had not received phone of Sarpanch of village Endhal. For a moment, if it is believed that Smt.Bhanuben Somabhai had not received a phone from the Sarpanch of village Endhal then it is a matter of surprise as to how P.S.I. Shri Desai went to village Endhal without any information from Smt.Bhanuben Somabhai. She has courage to depose in her evidence that she had not sent any message with regard to this case by making telephone during the period between 14.00 hours and 20.00 hours. Smt.Bhanuben Somabhai is speaking lie looking to the evidence of P.S.I. Desai. P.W.7 Dinubhai has categorically deposed that he had sent a message to Gandevi Police station on phone from the house of his neighbour - one Doctor. P.S.I. Desai has said that he received a message from P.S.O. Smt.Bhanuben Somabhai and on receipt of that message, he went to the village Endhal. This evidence is necessary for careful scrutiny. It is now well established procedure adopted in all the Police Stations, that in the Police Station, a register of "in-coming" telephone calls more particularly calls with regard to commission of offences is kept and maintained and such calls are being noted down in this type of Telephone Register. In the Police Station, station diary is also kept and maintained and in that station diary, all type of messages are noted down and movement of Police Officer from hour to hour is being noted down. If P.W.7 Dinubhai had sent a message on phone to Gandevi Police Station and if Smt.Bhanuben Somabhai, P.S.O. was present in the Police Station, she must have noted down that message, in either "in-coming telephone register" or station diary. The prosecution has kept back this material and important documentary evidence though available to them. If entry from station diary or "incoming telephone register" had been produced

in the case, the Court could have come to know, as to what actual message was given by P.W.7 Dinubhai immediately after Karma Tukaram (complainant) gave him an information with regard to the alleged incident. Looking to this type of evidence, Mr.Bhatt has rightly argued that the prosecution has purposely withheld the best available documentary evidence. Had they produced it possibly, it would have run counter to the case of the prosecution. In light of this evidence, F.I.R. is to be examined as to whether it is ante-timed or not ?

22. As per the evidence of P.S.I. Desai, on 03.05.1993. On information received by him from Smt.Bhanuben Somabhai, he went to village Endhal and he took down the complaint of Karma Tukaram at the place of the incident. He has deposed that accused was found at the house of Sarpanch of village Endhal and at that time, the clothes of the accused were blood stained and accused was having with him a blood stained "Koita". Naturally, when a message was given by Sarpanch of the village to Gandevi Police Station on phone, P.S.I. Shri Desai would certainly first go to the house of Sarpanch because he gave first information to police and if he has come to know that this very accused has committed a murder of Mohanbhai Fatubhai Padvi by inflicting blows of "Koita" then it was his [Desai's] first duty to arrest him [accused] then and there. For police, it is most important aspect of police - investigation that when an information is received with regard to any cognizable offence, first police will try to find out the culprit because from culprit, he will come to know as to how the incident had taken place. Here in this case, P.S.I. Desai has admitted that accused was present in the house of Sarpanch Dinubhai Naranbhai Patel, and at that time his clothes were stained with blood and he was having with him a blood stained "Koita". It is interesting to note that P.S.I. Desai does not arrest him [accused] then and there. He took accused with him to the police station and by drawing an arrest panchnama, Ex.16, he arrested the accused at 23.30 hours. It is a matter of surprise that accused was arrested after about seven hours, though accused was readily available when the complainant lodged his complaint at 16.30 hours at the place of the incident. This fact with regard to late arrest of accused by seven hours makes us to believe that there is something fishy in the case. There was no reason for P.S.I. Desai for not arresting the accused at 16.30 hours, when the accused was very much available at the house of sarpanch. From his evidence, we have found that P.S.I. Desai was all the while much cautious for giving a time of each event which took place, after

receiving a message from P.S.O. Smt. Bhanuben Somabhai. Even, he has not stated as to when he received the information from P.S.O. He has stated that on 03.05.1993, he received a message from P.S.O. In the cross-examination, he has not stated as to when he reached to the house of Dinubhai Naranbhai Patel. He has given an evasive reply that in the afternoon, he had seen the accused at the house of the sarpanch of the village and did not arrest the accused at the house of sarpanch of the village. He has deposed that he had seen the accused in the afternoon and under the police surveillance, he took the accused to the police station and arrest panchnama was drawn. As said earlier that arrest panchnama was drawn very late by seven hours. He has given a lame excuse that he did not arrest the accused at the house of the sarpanch because he had to perform other formalities of the investigation. He has not made it clear as to what type of formalities he had to perform. This aspect of delay of seven hours makes us to believe that till 23.00 hours, it was not certain as to who had committed an offence. As per the case of prosecution, F.I.R. was taken down at 16.30 hours. The court has not see the timing noted down on the F.I.R. Many times, the Court, by scrutinizing other evidence, comes to a conclusion that F.I.R. is ante-timed. On this material point of contention, Mr.Bhatt has cited one decision, in the case of MEHRAJ SINGH Vs. STATE OF U.P., reported in (1994) 5 S.C.C. 188, wherein it has been held as follows :-

"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a

> murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR....."

23. Applying the aforesaid legal position for, F.I.R. to the facts of this case, we find that the prosecution has suppressed the genesis of the case by not producing the entry in respect of the message given by the Sarpanch of the village from "in-coming telephone register" or station diary. The accused was arrested after seven hours, though he was very much available with the weapon of "Koita" at the house of sarpanch at about 16.30 hours. With this type of evidence, we have tried to scrutinize the other evidence also. An inquest panchnama was drawn at the place of incident during the period between 17.15 hours and 18.00 hours on 03.05.1993. P.W.13 P.S.I. Desai has deposed that after drawing a panchnama of scene of offence, he sent deadbody of Mohanbhai Fatubhai to Dhanori Primary Health Centre for autopsy by sending it with one police constable Shri Kashinath Arjun. The prosecution has not examined Kashinath Arjun as to how he dealt with the deadbody during the period of its custody with him. The prosecution has examined P.W.2 Dr.Pravinbhai Durllabhbhai Patel (Ex.10), who performed the postmortem on the deadbody. He has deposed that on 04.05.1993, he was on duty as Medical Officer in Dhanori Primary Health Centre, and one police constable Kashinath Arjun brought deadbody in the Primary Health Centre at 12.00 P.M. (Noon) on 04.05.1993. He performed

postmortem during the period between 12.30 P.M. and 2.30 P.M. on that day. We are told that the distance between the place of incident and Gandevi is approximately 15 k.m. and Dhanori comes in between the place of incident and Gandevi and, therefore, the distance between the place of incident and Dhanori would be less than 15 k.m. It is surprising to note that the deadbody reached to Medical Officer, Primary Health Centre, Dhanori, at 12.00 hours (noon) on next day. The inquest panchnama was drawn at 18.00 hours on 03.05.1993. This fact is also necessary to be scrutinized. P.W.2 Dr. Patel has deposed that when he started to perform postmortem of the deadbody, he found that death of that person would have been caused before fifteen to sixteen hours. Mr.Bhatt has drawn our attention to Column No.11 of the Postmortem Notes, Ex.11. Dr. Patel found rigor mortis was positive meaning thereby rigor mortis was present. Mr.Bhatt has argued that after rigor mortis would appear in the first 12.00 to 16.00 hours. He has referred to MODI'S MEDICAL JURISPRUDENCE & TOXICOLOGY (22nd Edition of February 1999). On page-228, subject of Rigor Mortis is discussed. The relevant para reads as follows :-

"Cadaveric Rigidity or Rigor Mortis :-

"Cadaveric rigidity, which is also known as death stiffening, comes on immediately after the muscles have lost the power of contractility, and is due to the irreversible changes in the muscles of the body, both voluntary and involuntary.

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Rigor mortis generally occurs whilst the body is cooling. It is no way connected with the nervous system, and it develops even in paralysed limbs, provided that the paralysed muscle tissues have not suffered much in nutrition. It is retarded by perfusion with normal saline.

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Time of onset : The varies greatly in different cases, but the average period of its onset may be regarded as three to six hours after death in temperate climates, and it may take two to three

hours to develop. In India, it usually commences in one to two hours after death.

Duration : In temperate regions, rigor mortis usually lasts for two to three days. In northern India, the usual duration of rigor mortis is twenty-four to forty-eight hours in winter and eighteen to thirty-six hours in summer..... In general, rigor mortis sets in one to two hours after death, is well developed from head to foot in about twelve hours.....

Atmospheric Conditions :

Rigor mortis commences slowly, but lasts for a long time in dry, cold air. On other hand, its commencement is rapid, and duration short, in warm, moist air......."

24. The incident took place in the month of May, 1993 in Valsad District where the atmosphere is with moist air. Under the circumstances, looking to the rigor mortis on the deadbody, Dr.Patel has rightly opined that the death must have occurred fifteen to sixteen hours before the time when he started to perform the postmortem. He started to perform postmortem at 12.30 P.M. on 04.05.1993 and from his evidence it can be said that the death of Mohanbhai Fatubhai must have been occurred during the period between 8.30 P.M. to 9.30.P.M. on 03.05.1993. This aspect is required to be considered with the fact of late arrest of accused by seven hours. Thus, from the evidence, it appears that the incident might have taken place in the evening on 03.05.1993 and police must have reached there in the evening, but as culprit was not available, the F.I.R. was kept blank till the accused was arrested and, subsequently, the F.I.R. was taken down. At this stage, it is required to note that though complaint was lodged registered in Gandevi Police Station, at 17.00 hours on 03.05.1993 a copy of it was sent to the J.M.F.C., Gandevi on the next day i.e. on 04.05.1993 and it was received by the Court of the J.M.F.C., Gandevi at 10.50 A.M. on 04.05.1993. If it was registered at 17.00 hours on 03.05.1993 in Gandevi Police Station then there was no reason for sending the copy of F.I.R. to the learned J.M.F.C., Gandevi on the next day. It ought to have been forwarded at the earliest to learned J.M.F.C., Gandevi, who was available in Gandevi itself. This cross check

also suggests that F.I.R. in this case is time barred.

25. It is the case of the prosecution that P.S.I. Desai took down the complaint of Karma Tukaram at the place of incident at 16.30 hours and, thereafter, P.S.I. Desai sent that complaint for its registration to Gandevi Police Station along with a Yadi Ex.29. That Yadi, Ex.29 was received by P.W.12 P.S.O. Smt. Bhanuben Somabhai and she registered an offence at 5.00 P.M. After that complaint was registered, P.W.12 P.S.O. Smt. Bhanuben Somabhai put an endorsement below that Yadi Ex.29, and entrusted the police investigation to P.S.I. Desai. It is commonly known a routine that when a written complaint is given under Police Station, an offence is registered giving criminal registration number. Thereafter, that complaint will be copied down in the "F.I.R. Register" and usually its entry is made in the station diary also. Thereafter, a copy of F.I.R. from the "F.I.R. Register" will be sent to the nearest Judicial Magistrate. If P.W.12, Smt.Bhanuben Somabhai had received that complaint (Ex.33) at 5.00 P.M. and if an offence was registered by giving C.R.No.I-34/93 in Gandevi Police Station at 5.00 P.M. Naturally, Smt.Bhanuben Somabhai must have spent sometime for copying down it in the F.I.R. Register and preparing a copy from F.I.R. register for sending that copy to Judicial Magistrate, Gandevi. Looking to these admitted formalities, she must have spent at least 5 to 10 minutes and then by putting an endorsement below that Yadi, Ex.29, she must have sent the complaint Ex.33 for police investigation to P.S.I. Desai, which was there at the place of incident. If a police constable, who carried that complaint Ex.33 along with a Yadi Ex.29, had spent half an hour for reaching Gandevi Police Station from the place of incident, he must have spent equal time for coming back from Gandevi Police Station to the same place of incident where P.S.I. Shri Desai was very much present. Therefore, if, we calculate the time from 5.10 P.M. for coming back to the place of incident, he must have reached back to the place of incident not before 5.40 P.M. Herein this case, it is interesting to note that after receipt of the complaint Ex.33 from P.S.O. Smt. Bhanuben Somabhai, P.S.I. Desai drew an inquest panchnama (Ex.13) at the place of incident at 17.15 hours and completed it at 18.00 hours on 03.05.1993. If, we peruse an inquest panchnama (Ex.13), we find that P.S.I. Shri Desai has mentioned the crime register number i.e. C.R.No.I-34/93 of Gandevi Police Station in this Inquest panchnama (Ex.13). If, he had received the complaint Ex.33 back from Smt.Bhanuben Somabhai at 5.40 P.M., there cannot be any reference of Crime Registration number in the inquest panchnama (Ex.13). This fact also suggests

that F.I.R. was time barred. As stated in the case of Mehraj Singh [Supra], the Hon'ble Supreme Court has held that with a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In inquest panchnama, there is no reference of the name of the complainant. That name of complainant ought to have been reflected in the inquest panchnama because the complaint was lodged much earlier at 4.30 P.M. As stated earlier, P.S.I. Desai received back the complaint Ex.33 from P.S.O. Smt. Bhanuben Somabhai at 5.40 P.M., there cannot be any reference of Crime Registration number in inquest panchnama, Ex.13.

26. We have examined the copy of F.I.R. sent to the learned J.M.F.C., Gandevi, it was received at 10.15 A.M. on 04.05.1993. The prosecution has not explained the delay for sending a copy of F.I.R. to the learned J.M.F.C., Gandevi, so late by 17 hours on next day. The learned J.M.F.C., was available at Gandevi itself on 03.05.1993. Smt.Bhanuben Somabhai registered a crime at 5.00 P.M. She should have sent a copy of F.I.R. immediately to the learned J.M.F.C., Gandevi in the Court itself because the working hours of Court are from 10.30. A.M. to 6.10 P.M. This fact also suggests that F.I.R. is ante-timed.

27. It is the case of the prosecution that the incident took place at about 2.00 P.M. on 03.05.1993 and

P.W.10, Vaishali Mohanbhai Padvi, Ex.25 rushed to her mother and informed her about the occurrence of the incident. As per the say of Vaishali, she went running and first, she informed about the incident to her mother and then in turn, her mother told the fact conveyed by Vaishali to complainant Karma Tukaram and, thereafter, Karma Tukaram, Rainaben and other 7-8 labourers started to proceed towards the camp of the labourers and the accused met them on the way and they caught hold of him and brought him to sarpanch Dinubhai Naranbhai Patel. P.W.7 Dinubhai Naranbhai Patel, Ex.22, who is a literate person has deposed that Karma Tukaram in company of 7 to 8 labourers had come to his residence at 3.30 P.M. In view of this fact Vaishali must have met her mother in the field at least at about 3.00 P.M. Thus, according to the evidence on record, Vaishali aged nine years covered up a distance of about 3 k.ms. within a hour which is not possible. Therefore, this aspect also suggests that F.I.R. is ante-timed. Vaishali has deposed that she went to her mother, in the morning. If incident took place at 2.00 P.M., she would not have gone to her mother in the morning.

28. Keeping in mind the aforesaid discussion with regard to F.I.R. which ex-facie appears to be ante-timed, now we discuss the evidence of key - witness P.W.10 Vaishali Mohanbhai Padvi, Ex.25 because she is projected as an eye witness to the incident. Admittedly, on the date of recording evidence, P.W.10 Vaishali Mohanbhai Padvi, Ex.25 was 10 years old. Her evidence was recorded one year after the date of incident and, therefore, on the date of incident, she was of a tender age of 9 years. In view of Section 118 of the Indian Evidence Act, it was required to ascertain by the learned Judge of the trial Court as to whether she was competent to testify and that can only be done by putting certain informal questions to the child witness and from the answers given by such child witness, the Court has to ascertain from answers given by her as to whether she understands the questions or not. The court has to ascertain, as to whether answers given by her are rational answers or not and for this a preliminary examination was required to be conducted before examining the child, as a witness before the Court. Questions as to the competency or incompetency of a witness are decided by the judge, generally on a preliminary examination which is called the voir dire.

29. Here in this case, the learned Judge of the trial Court has only put an endorsement in the beginning of her evidence that the witness is of a minor age and she

possesses "efficiency of understanding and, therefore, her deposition has been recorded." There is nothing on record as to whether any preliminary inquiry was held to ascertain as to whether Vaishali was competent witness or not. Without ascertaining the fact as to whether she understands sanctity of oath, straightway oath was given to her. Absence of preliminary inquiry with regard to competency of witness and understanding about the sanctity of oath are kept in mind, while assessing the evidence of Vaishali.

30. As Vaishali, is admittedly, a child witness. The law on the subject of child witness is required to be kept in mind. The child is innocent and means to speak the truth. Though it must not be lost sight of, he is capable of committing perjury or being influenced, since it is an exception to his nature, he is usually unable to keep up a consistent false story through the various questioning of a tried examiner, which serves as a pretty safeguard against any danger on him.

Again, it must not be forgotten that a child is peculiarly exposed to external influence, whether designed or accidental. Anyone, knowing that a child is to appear as a witness in a court of justice, if he is interested in his statement and has the chance of influencing it himself, will almost certainly exert that influence. The child, as yet devoid of principles, places great faith in the words of grown-up people; so, if a grown-up person brings influence to bear on it, especially sometime after the occurrence, the child will imagine, it has really seen what it has been led to believe. This result is obtained with certainty, if the man proceeds slowly and by degrees leading the child to the desired goal by repeated simple questions as "Is it not so ?" It was not so', "Was it not thus ?"

Children perceive and forget a hundred things in an hour. Their brain is so soft that it receives immediately all impressions, like water or liquid, which are drawn there, immediately effaced or closed up again, as though you write with your finger on the surface of a river or on a vessel of oil.

They are not expected to remember the dates of events. Their memory is often confused with dreams.

Their perceptions, though quick, are imperfect. A child may be very quick to perceive a right some things which it sees or hears; but for want of knowledge or experience, it may perceive imperfectly other things it

sees or hears.

Children of tender age, generally speaking are not to be regarded as trustworthy witnesses, since they can easily repeat glibly a story put into their mind, and do not possess the discretion to distinguish between what they have seen and what they have heard. As a matter of prudence, therefore, courts are generally chary of putting absolute reliance on the evidence of a solitary child witness and look for corroboration of the same from other circumstances in the case.

The evidence of a child witness is notoriously dangerous unless immediately available and received before any possibility of coaching is eliminated. Prudence requires that courts should not act on the uncorroborated evidence of a child whether sworn or unsworn.

The children, particularly of tender age have good memory and no conscience. They can be easily taught stories which they believe to be true. They often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. While considering evidence of a child witness, these considerations should not be lost sight of. The evidence of a child witness is to be approved with caution. Children are susceptible to tutoring and the court should be always careful in detecting such infirmities.

Though, it is an established principle that child witnesses are dangerous witnesses, as they are pliable and liable to be influenced easily due to their tender age, and their evidence can be easily shaken and moulded....

31. Keeping in mind the aforesaid legal position with regard to child witness, we will examine the evidence of P.W.10 Vaishali Mohanbhai Padvi, Ex.25. It is admitted fact that as per the say of P.W.10 Vaishali, her father was sleeping inside the temporary residence in the camp and she was playing with her sister and daughter of maternal aunt behind the hut. She has not deposed anything giving brief account of events which took place prior to actual incident of murder. She has not deposed anything as to how and from where accused came and what happened first with her father inside their temporary residence in the camp. She has only deposed that she saw that accused inflicted blows with "Koita" on head, neck,

face and hand of her father and at that time, she was present on the side of the hut and that she had seen that Shravan had beaten her father. If she was really an eye witness to the incident, she would not have deposed in cross-examination that her mother informed her that accused had beaten her father by "Koita" and, therefore, there it smells of tutoring to this witness by her mother. As per the evidence of the prosecution, the incident took place at 2.00 P.M. and, thereafter, she went running to her mother and informed her about the incident. If really it had so happened, then she would not have deposed in her evidence that in the morning she had gone to her mother and, therefore, she is not consistent in her evidence. We can not except exact time for going from the place of incident to her mother, but at least, she understood what is morning, of afternoon and what is evening and, therefore, this fact also suggests that she had seen nothing, but she deposed at the instance of her mother. In such type of cases, the corroboration is required so as to appreciate the evidence of child witness. Ms.Punnani, learned APP for the respondent - State of Gujarat has argued that P.W.11 Rainaben has corroborated the evidence of Vaishali. What Rainaben has corroborated, is corroboration to the fact with regard to information given by Vaishali to her. This corroboration is not to the fact that accused inflicted blows with "Koita" on the body of the deceased Mohan Fatu Padvi. There were other two eye witnesses to the incident, one was Mangala and another was a daughter of sister of Rainaben. The prosecution ought to have examined either of these two girls Mangala is elder than Vaishali, Mangala could have given better account of the incident. P.W.11 Rainaben had tried to explain for not examining Mangala by saying that she is deaf. Here in this case, question is not with regard to any hearing. She was capable to see the incident and she could have narrated the incident in the Court by deposing like Vaishali. In view of this fact, this Court is of the view that the entire evidence on record is so fishy and hazy that it would be hazardous and risky to place reliance only on the bare words of Vaishali who is a child witness.

32. On over all appreciation of the evidence on record and in view of the aforesaid discussion, we are of the view that Vaishali being a child witness appears to have been tutored by her mother. The prosecution has not allowed the evidence of Mangala to come on record for giving corroboration to Vaishali and thus, the evidence of Vaishali is disbelieved by us and, therefore, the entire case of the prosecution falls to ground. In such

a situation, it cannot be said that the prosecution has proved beyond reasonable doubt, the case against the accused for which the charge was framed.

33. In view of what is stated hereinabove, we find that the learned Judge of the trial Court has not appreciated the evidence correctly in its proper perspective. He has blindly placed reliance on evidence of Vaishali and proceeded further that what she has stated is trustworthy and reliable. He has not examined the other evidence independently and, therefore, this is a case in which interference by this Court is very much warranted. Looking to nature of evidence benefit of doubt deserves to be extended to accused.

34. For the foregoing reasons, this appeal deserves to be allowed and accordingly, it is allowed. The judgment, Ex.44 of conviction and sentence dated 11.10.1994 rendered by the Additional Sessions Judge, Valsad at Navsari in Sessions Case No.76 of 1993 is hereby quashed and set aside. Accused is acquitted for an offence punishable under Section 302 of I.P.C. The appellant be set free, if he is not required in any other case. Muddamal articles be disposed of as per the directions given by the learned Judge of the trial Court, in the operative order of the impugned judgment. The appellant - accused was released on bail pursuant to order of this Court dated 24.12.2001. Bail bond executed by the appellant - accused shall stand cancelled and surety is discharged.

[M.H.Kadri,J.] [H.H.Mehta,J.]

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